No. 17034

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

R. MILO GILBERT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

RULES

STATUTES

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APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

On August 5, 1959, the Grand Jury for the Southern District of California indicted appellant in thirty-five counts.

In essence counts one through eleven charge appellant with wilfully and knowingly aiding and assisting in the preparation of false and fraudulent income tax returns. Counts twelve through fourteen and counts twenty-one and twenty-two charge appellant with wilfully and knowingly forging United States Treasury checks. Counts fifteen, sixteen and seventeen charge appellant with knowingly and wilfully presenting a forged United States Treasury check to an office of the United States. Counts

eighteen, nineteen and twenty charge appellant with knowingly and wilfully making a material false representation to an agency of the United States. Counts twenty-three through thirty-five charge appellant with wilfully and knowingly aiding and assisting in the preparation of false and fraudulent income tax returns. [C. T. 25-59.][1]

Upon arraignment [R. T. 2][2] and a plea of not guilty to all counts [R. T. 72-75], appellant was tried by jury and convicted on counts four through thirty-four and acquitted on counts one, two, three and thirty-five. [R. T. 1114-1116.] On January 22, 1960, sentence was imposed by the court, under which appellant was committed to the custody of the Attorney General for a period of one year and one day for each of counts four through thirty-four, the sentence to run consecutively for a period of thirty-one years and thirty-one days and a fine of $5,000. [R. T. 1157-1163.]

Jurisdiction of the District Court is predicated upon Title 18, United States Code, Sections 495 and 1001 and Title 26 United States Code, Section 7206(2) and Title 18, United States Code, Section 3231. The jurisdiction of this court rests pursuant to Title 28 United States Code Sections 1291 and 1294.

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[1]C. T. refers to Clerk's Transcript of Record.

[2]R. T. refers to Reporter's Transcript of Proceedings.

II.
STATUTES INVOLVED.

Section 7206(2) Internal Revenue Code of 1954 provides in pertinent part as follows:

"Sec. 7206—Fraud and False Statements.

"Any person who . . .

"(1) . . .

"(2) Aid or Assistance. Wilfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the Internal Revenue Laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; . . . shall be guilty of a felony and upon conviction thereof, shall be fined not more than $5,000 or imprisoned not more than three years, or both, together with the cost of prosecution."

Title 18, United States Code, Section 495 provides in part as follows:

"Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or

"Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the

same to be false, altered, forged, or counterfeited; or

"Whoever transmits to, or presents at any office or officer of the United States, any such writing in support, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited . . . shall be fined not more than $1,000 or imprisoned not more than ten years, or both."

Title 18, United States Code, Section 1001 states in pertinent part as follows:

"Whoever, in any manner within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

III.

STATEMENT OF THE CASE.

Appellant was indicted on August 5, 1959, [C. T. 25], arraigned [R. T. 2], and pleaded not guilty. [R. T. 72-75.]

A motion to suppress was filed by appellant on August 21, 1959 [C. T. 74] and an opposition filed thereto on September 18, 1959. [C. T. 81.] A reply affidavit was filed by appellant on September 24, 1959. [C. T. 88.] After argument on the motion to suppress [R. T. 33-71], the Court granted the motion to suppress except as to the files relating to counts twelve,

thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, twenty-one, and twenty-two [C. T. 66-67] and entered an order pursuant to this ruling, wherein appellee could only retain the files concerning James and Manon Manion, N. and T. Libling, Dolores J. Frankel, Fay Matorian, Daniel H. and Charline R. Bartfield. [C. T. 96-97.]

Appellant having been found guilty [R. T. 1114-1116], sentence was imposed on January 22, 1960. [R. T. 1157-1163.]

Appellant specified the following points on appeal:

1. The Government's case is based on illegally obtained evidence.

A. The search and seizure were illegal and in violation of the fourth Amendment.

B. The counts charged [1 through 20 and 23 through 35] as a result of the illegal search and seizure; and the counts thereof upon which defendant was convicted as a result thereof [4 through 20 and 23 through 34] should have been dismissed and defendant's motion for acquittal and a new trial should have been granted.

2. The Manion Exhibits (19 and 22) were improperly admitted into evidence.

3. When one does not purport to be duplicating the signature of a payee, and endorses the check "as trustee", the crime of forgery has not been committed.

4. It was error to admit evidence concerning the tax returns in connection with the forgery and false and fraudulent statements re endorsement of checks counts.

5. The evidence was insufficient to sustain the verdict as to counts 21 and 22.

IV.
STATEMENT OF FACTS.

On January 2, 1959, pursuant to a warrant of arrest for a violation of Title 18, United States Code, Section 495 [C. T. 239-240] Agent James H. Hirst, United States Secret Service, Treasury Department, went to the home of appellant at 2747 North Lincoln Street, Burbank, California, accompanied by Agent William Coyne. [C. T. 81.]

Upon arrival at appellant's residence, Agent Hirst displayed his credentials, handed appellant a copy of the warrant, and placed appellant under arrest. [C. T. 82, 88.]

Incident to this arrest, appellant, who for a number of years had been in the business of preparing tax returns for clients [C. T. 89], was requested by the agents to show his tax records, files, and papers. [R. T. 82, 86.] These files were perused by the above agents, aided by agents Fritz T. A. Borchardt and Milton Lewis, Intelligence Division, Treasury Department. Furthermore, invitation to inspect these records was made by appellant during this perusal. [R. T. 82, 86.] All the records examined were taken into custody by Agent Hirst. [C. T. 82.]

On hearing the motion to suppress, the Honorable Leon Yankwich stated:

> ". . . I will grant the motion to suppress as to all the files except those relating to the four checks as set forth in Counts twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, twenty-one, and twenty-two. The motion will be denied as to such files as relate to those offenses because they bear upon the instrumentality of the forgery." [R. T. 66-67.]

Count Twelve concerns a forged check of James J. Manion. [C. T. 36.] Count Thirteen concerns a forged check of Manon Manion. [C. T. 37.] Count Fourteen deals with a forged check of Manon Manion. [C. T. 38.] Count Fifteen deals with a forged check of James J. Manion. [C. T. 39.] Count Sixteen concerns the forged check of N. & T. Libling. [C. T. 40.] Count Seventeen relates to the forged check of Dolores J. Frankel [C. T. 41.] Count Eighteen relates to the forged check of Fay Matorian. [C. T. 42.] Count Twenty-one concerns a forged check of Daniel H. and Charline R. Bartfield. [C. T. 45.] Count Twenty-two relates to a forged check of Daniel H. and Charline R. Bartfield. [C. T. 46.]

The court requested that appellant make the order for suppression of evidence [R. T. 76-77] which was in fact accomplished by appellant and set forth as follows:

"...

"Defendant's Motion For the Return of Seized Property and the Suppression of Evidence was granted and all of the property seized from defendant was ordered returned to defendant and the said property was ordered suppressed as evidence against defendant, except in the following particulars, wherein the Motion was denied:

1. File in relation to James Manion and Manon Manion.
2. File in relation to N. & T. Libling.
3. File in relation to Dolores J. Frankel.
4. File in relation to Fay Matorian.
5. File in relation to Daniel H. and Charlene R. Bartfield . . ." [C. T. 96-97.]

V.
ARGUMENT.

A. Appellee's Case Is Not Based Upon Illegally Obtained Evidence.

1. The Search and Seizure Was Lawful.

The trial court ordered the suppression of evidence to all materials taken by the arresting officers, except to those files relating to James Manion and Manon Manion, N. and T. Libling, Dolores J. Frankel, Fay Matorian and Daniel H. and Charline R. Bartfield [R. T. 66-67, C. T. 96-97.] It will, therefore, be necessary to determine whether the latter files were legally seized. Prior to broaching the problem of the legality of the search and seizure, it must be ascertained whether a valid arrest was effected.

It was stated in *Harris v. United States,* 331 U. S. 145 (1947), at page 150:

> "The Fourth Amendment has never been held to require that every valid search and seizure be effected under the authority of a search warrant. Search and seizure incident to lawful arrest is a practice of ancient origin . . ."

In the case at bar, a complaint was filed alleging that appellant had violated the provisions of Title 18, United States Code, Section 495, namely, forging of a United States Treasury check. [C. T. 239.] Pursuant to this complaint, a warrant of arrest issued for the arrest of appellant [C. T. 240.] With this warrant in hand, Agent James Hirst went to the home of appellant, and, after properly identifying himself, placed appellant under arrest. [C. T. 82, 88.]

Appellant urges, but apparently without vigor, that the warrant of arrest was invalid (Appellant's Br. p. 36.)

It should be noted that at the motion to suppress appellant approached the issue from a radically different vein, stating:

> "Mr. Dorn: I make no point, if the court please, at this time as to the fact they arranged to arrest him at his home. I only stated that they had a right to do that and no point is made of that at all.
>
> ". . . He came to the home with that warrant and made a lawful arrest. I do not deny that the arrest was anything but lawful." [R. T. 38-39.]

The contention of appellant seems to be that the arrest was improper because the return of the warrant of arrest was made [C. T. 240] was made three days after the arrest (Appellant's Br. p. 36a.)

However, a return of a warrant is a ministerial act and any failure therein does not void the warrant.

> *Evans v. United States,* 242 F. 2d 534, 536 (6th Cir. 1957), *cert. den.* 353 U. S. 976 (1957).

It is thus apparent that merely because the return on the arrest warrant states January 5, 1959 [C. T. 240] it would in no way invalidate the warrant or arrest, which all parties agree was executed on January 2, 1959. [C. T. 82, 86, 88.]

Nevertheless, were we to assume that the warrant of arrest was invalid, there was yet a valid arrest.

Where a warrant of arrest is invalid on its face, if there are facts which are sufficient to justify apprehension without a warrant, the arrest is lawful and valid.

Go-Bart Importing Company, et al. v. United States, 282 U. S. 344 (1931);

United States v. Rabinowitz, 339 U. S. 56 (1950).

Agent Hirst, in the instant case, had evidence that appellant had committed the crime of forgery of a United States Treasury check and manifestly had sufficient probable cause to arrest appellant without warrant.

Having concluded there has been a lawful arrest, it is incumbent upon us to decide whether there was a lawful search and seizure incident to that arrest.

As it has been posited in numerous cases, "each case is to be decided on its own facts and circumstances . . ."

Go-Bart Importing Company, et al. v. United States, supra;

Harris v. United States, supra.

Although each case must be decided on its own facts, there are certain guide posts which have been set forth in various cases to aid us in our determination.

The difficulty of reconciling the numerous cases in this area was recognized by the Supreme Court in *Abel v. United States,* 362 U. S. 217, 235 (1960), wherein it stated:

> ". . . The several cases on this subject in this Court cannot be satisfactorily reconciled. This problem has, as is well-known, provoked strong and fluctuating differences of view on the Court. This is not the occasion to attempt to reconcile all the

decisions, or to re-exmaine them. Compare *Marron v. United States,* 275 U. S. 192, with *Go-Bart Co. v. United States,* 282 U. S. 344, and *United States v. Lefkowitz,* 285 U. S. 452; compare *Go-Bart, supra,* and *Lefkowitz, supra,* with *Harris v. United States,* 331 U. S. 145, and *United States v. Rabinowitz,* 339 U. S. 56; compare also *Harris, supra,* with *Trupiano v. United States,* 334 U. S. 699, and *Trupiano* with *Rabinowitz, supra* (overruling *Trupiano*). Of these cases, *Harris* and *Rabinowitz* set by far the most permissible limits upon searches incidental to lawful arrest. In view of their judicial context, the trial judge and the Government justifiably relied upon these cases for guidance at the trial . . ."

Looking then to *Harris v. United States, supra,* page 154, the Court states,

". . . This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime . . ."

Of considerable assistance is *Abel v. United States, supra,* wherein the defendant was arrested on an administrative warrant for deportation. Seven items were discovered pursuant to the search: (1) A piece of graph

paper. (2) A forged birth certificate in the name of "Martin Collins". (3) A forged birth certificate of "Emil Goldfus". (4) A certificate of vaccination issued to "Martin Collins". (5) A bank book in the name of "Emil Goldfus".

(6) A hollowed-out pencil with microfilms.

(7) A block of wood containing a "cipher pad."

Items (1) and (2) were obtained pursuant to a search of the defendant's apartment, incident to the administrative warrant. Items (3), (4), and (5) were found in defendant's belongings, which he had brought with him, at the Immigration and Naturalization Service headquarters where the agents had taken him. Items (6) and (7) were found by a Federal Bureau of Investigation Agent in a search of the hotel room after defendant had abandoned it and the agent had received permission from the hotel manager.

With respect to Item (2), the forged birth certificate with the name "Martin Collins" the Supreme Court stated at pages 237-238:

> "Two of the challenged items were seized during this search of petitioner's property at his hotel room. The first item (2), a forged New York birth certificate for 'Martin Collins', one of the false identities which petitioner assumed in this country in order to keep his presence here undetected. This item was seizable when found during a proper search, not only as a forged official document by which petitioner sought to evade his obligation to register as an alien, but also as a document which petitioner was using as an aide in the commission of espionage, for his undetected presence in this country

> was vital to his work as a spy. Documents used as a means to commit crimes are the proper subjects of search warrants. . . ."

Appellant states "The Government had all the evidence, documentary and oral, which it could possibly need for the charge in the warrant." (Appellant's Br. p. 35.) He apparently is assuming that the tax refund checks and the statements of the true payees that they were signed without authority were all that were necessary. If that were the case, in *Abel* the Immigration and Naturalization Service had all the information it needed to show that the defendant was an alien, and not having reported to the Attorney General every January of his address, was therefore subject to deportation. But yet the Supreme Court held that the forged birth and vaccination certificates were proper articles for seizure incident to the arrest.

Similarly, in the instant case the instrumentalities and means of committing the crime of forgery on these pertinent tax refund checks were found in the files of the taxpayers in the hands of appellant. Information was furnished by the respective taxpayers to appellant in order to make out their tax returns; by James J. Manion, [R. T. 372-373, 378], by Manon Manion [R. T. 444], by N. & T. Libling [R. T. 361, 366], by Dolores J. Frankel [R. T. 463, 464], by Fay Matorian [R. T. 341, 352, 356], Appellant, then, increased the deductions and expenses, thereby falsifying the tax records and returns to increase the amount of the tax refund. Upon the subsequent receipt of the tax refund check, appellant would then forge the names of the payees to get the proceeds. Thus, the method of forgery in the instant case is similar to the use of false identification in

Abel v. United States, whereby Abel was able to stay in the United States and also conduct espionage activities. Certainly the facts bear out the contention that these records and files are instrumentalities of the crime of forgery.

Appellant's statement that the affidavits of the agents is indicative of the fact that they were not seeking the instrumentalities of the forgery but evidence (App. Br. p. 34) is only worthy of consideration because of the problem of semantics. Indeed affidavits which would read that they were looking for "instrumentalities of forgery" would bear close scrutiny. Instrumentalities of forgery, though they may be termed as such, are yet "evidence" which may be used to prove the crime. It was stated in *Abel v. United States,* page 236,

> "Nor is there any constitutional reason to limit the search for materials *proving* the deportability of an alien, when validly arrested, more severely than we limit the search for materials *probative* of crime when a valid criminal arrest is made. . . ." (Emphasis added.)

Now referring to *Rabinowitz v. United States,* 339 U. S. 56, 61 (1950), the Court states:

> "In *Marron v. United States,* 275 U. S. 192, the officers had a warrant to search for liquor, but the warrant did not describe a certain ledger and invoices pertaining to the operation of the business. The latter were seized during the search of the place of business but were not returned on the search warrant as they were not described therein. . . . The search warrant was held not to cover the articles seized, but the arrest for the offense being

committed in the presence of the officers was held to authorize the search for and seizure of the ledger and invoices, this Court saying:

> 'The officers were authorized to arrest for crime being committed in their presence, and they lawfully arrested Birdsall. They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise. . . . The closet in which liquor and the ledger were found was used as a part of the saloon. And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense. And, while it was not on Birdsall's person at the time of his arrest, it was in his immediate possession and control. The authority of officers to search and seize the things by which the nuisance was being maintained, extended to all parts of the premises used for the unlawful purpose.' . . ."

It is difficult to distinguish the ledger and invoices used for committing the offense of maintaining a nuisance, and the records and files as a means of committing the crime of forgery in the instant case.

Seizures of an adding machine, a telephone, record books, receipts, pencils, pens, money and the keys to safe deposit boxes were held to be lawful and valid where the arrest was made for a violation of evasion of tax due on wagering activity.

Leahy v. United States, 272 F. 2d 487 (9th Cir. 1959).

Appellee urges that the files of the various individuals who were the payees of the forged Government tax refund checks were instrumentalities and the means of committing the crime of forgery and properly seized as incidental to the arrest of appellant. In fact, although appellee is bound by the ruling of the trial court suppressing some of the evidence, it is our contention that the total seizure was valid.

2. Evidence Used in Appellee's Case Was Properly Obtained.

Appellant next contends that all of the counts in the indictment, except counts twenty-one and twenty-two, were buttressed by illegally obtained evidence (Appellant's Br. pp. 36-37.)

Rule 51, Federal Rules of Criminal Procedure, 18 U. S. C. A. reads in pertinent part as follows:

> "Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefore . . ."

There must be a proper objection to the admissibility of evidence, stating the grounds for such objection.

Onlee v. United States, 343 U. S. 747, 749 (1952);

Bohol v. United States, 227 F. 2d 330, 331 (9th Cir. 1955);

Duncan v. United States, 68 F. 2d 136, 140 (9th Cir. 1933); *cert. den.,* 292 U. S. 646 (1934);

Silkworth v. United States, 10 F. 2d 711, (2nd Cir. 1926) *cert. den.,* 271 U. S. 664 (1926).

In the case at bar, except for Exhibits Nineteen and Twenty-two, Appellant at no time objected to the use of any of the exhibits nor to their introduction into evidence on the basis that they were illegally obtained: *e.g.* Exhibits 1 through 7 [R. T. 201], Exhibits 8 and 9 [R. T. 593-594], Exhibits 10 and 11 [R. T. 597], Exhibits 12 and 13 [R. T. 494-495],[3] therefore, Appellant is not now in any position to object on appeal.

However, were proper objections timely made, the nature of the evidence used by Appellee would show that such evidence was available to the Appellee without resorting to those materials which were in the hands of Appellant.

It was stated in *Benetti v. United States,* 97 F. 2d 263, 267 (9th Cir. 1938).

> "Even if the crime for which Appellant was indicted was revealed by an alleged search and seizure in another case, he would not be immune from persecution and his conviction cannot be set aside if sustained by evidence obtained from independent sources and no evidence illegally seized was used against him. Constitutional provisions forbidding the use of evidence secured in an illegal way are not to be construed to mean that facts thus disclosed are forever inaccessible . . ."

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[3]See Master Index [R. T. V, VI, VII], for further manifestation that objections were not made to the introduction of various exhibits.

Likewise if Appellant would extend his quotation of the United States Supreme Court in *Silverthorne Lumber Company v. United States,* 251 U. S. 385, 392 (1920) (Appellant's Br. p. 37), it would read as follows:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all. *Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others . . .*" (Emphasis added.)

Accord:

> *United States v. Sheba Bracelets,* 248 F. 2d 134, 141 (2nd Cir. 1957), *cert. den.* 355 U. S. 904 (1957).

In the case at bar, the following exhibits were income tax returns for various individuals:

> Exhibits 1 [R. T. 140], 2 [R. T. 144], 3 [R. T. 145], 4 [R. T. 151], 5 [R. T. 151], 8 [R. T. 217], 9 [R. T. 278], 10 [R. T. 285, 329], 15 [R. T. 357], 17 [R. T. 371], 18 [R. T. 494], 20 [R. T. 371], 21 R. T. 494], 27 [R. T. 463], 28 [R. T. 463], 33 [R. T. 451], 34 [R. T. 451], 35 [R. T. 496], 36 [R. T. 503], 37 [R. T. 496], 38 [R. T. 503], 39 [R. T. 496], 40 [R. T. 503], 41 [R. T. 520], 42 [R. T. 528], 43 [R. T. 520], 44 [R. T. 528], 45 [R. T. 520], 46 [R. T. 528], 67 [R. T. 557].

Furthermore, the following exhibits were tax refund checks which were not only accessible to the Appellee but also were property of the United States Government:

> Exhibits 12 [R. T. 494, 287], 13 [R. T. 494, 340], 16 [R. T. 359], 23 [R. T. 384], 24 [R. T. 384], 25 [R. T. 446], 26 [R. T. 446], 29 [R. T. 466], 30 [R. T. 484], 31 [R. T. 452], 32 [R. T. 452].

The following exhibits were income tax "W-2 forms" for withholding taxes and also available to Appellee:

> Exhibits 47 [R. T. 507], 50 [R. T. 512], 51 [R. T. 512], 57 [R. T. 543], 58 [R. T. 543], 59 [R. T. 543].

Additionally, the following exhibits were records of private concerns and in no way connected with the Appellant:

> Exhibits 48 [R. T. 509], 49 [R. T. 508], 52 [R. T. 512], 53 [R. T. 512], 54 [R. T. 517], 60 through 65 [R. T. 545].

Counts twenty-three through twenty-eight concern Juventino Silva and Celia Sally Silva, [C. T. 47-52] who were not at all mentioned in Appellant's "Schedule of Property." [C. T. 65-68.]

Appellant has offered an explanation (Appellant's Br. p. 40) which can be termed appropriately, as "wild speculation", but without basis in fact or logic. It is obvious that none of the materials taken from Appellant were used in these counts.

The evidence as indicated obviates the basis for appellee continually offering to show to the court that the

evidence which it was using did not come from the search and seizure incident to Appellant's arrest. [R. T. 133, 606, 609.]

It is therefore, urged by Appellee that the evidence used in the trial was based completely on evidence properly obtained.

B. The Manion Exhibits, Nineteen and Twenty-Two, Were Properly Admitted Into Evidence.

Appellant argues that Exhibits Nineteen and Twenty-two should not have been admitted into evidence because illegally obtained. (Appellant's Br. p. 42.)

Trial Courts stated:

> "I will grant the motion to suppress as to all of the files except those relating to the four checks as set forth in Counts twelve, thirteen, fourteen, fifteen, Sixteen, Seventeen, Eighteen, twenty-one and twenty-two. The motion will be denied as to such files as related to those offenses because they bear upon the instrumentality of forgery." [R. T. 66-67] [C. T. 96-97.]

The admissibility of Exhibits Nineteen and Twenty-two which were the records and expenses of James J. and Manon Manion [R. T. 372-373, 378], related to counts twelve, thirteen, fourteen, fifteen all within the prescribed order.

Since there has been an adequate discussion under subtitle A, Appellee's Brief, as to the propriety of the search and seizure as to these files, there seems, to be no apparent reason why these two exhibits could not be admitted.

C. The Crime of Forgery Was Committed.

Appellant argues that the instruction, stating in effect that "one who executes an instrument purporting on its face to be executed by him as agent of a principal named herein, when in fact he had no authority from such principal to execute said instrument is not guilty of forgery", should have been given. (Appellant's Br. p. 45.)

The United States Supreme Court broadly interpreted the statute in question as it stated in *Prussian v. United States,* 282 U. S. 675, 679 (1931).

> "The writings enumerated have no common characteristics from which a purpose may be inferred to restrict the statute to any particular class of writings. The addition of 'other writing' to the enumeration was therefore not for the purpose of including writing of a limited class, but rather of extending the penal provision of the statute to all writings of every class if forged for the purpose of obtaining money from an officer of the United States."

In *Ryno v. United States,* 232 F. 2d 581 (9th Cir. 1956), the defendant was a serviceman, whose wife was receiving a government allotment check in her own name. The defendant had changed the address of the check to "c/o Charles A. Ryno, 479th Maintenance Squadron, George Air Force Base, Victorville, California." Upon receiving the check in the name "Hazel R. Ryno," the defendant signed the check "Hazel R. Ryno", "Charles A. Ryno" and cashed the check. It was held by this Court that the defendant was guilty of forgery and uttering of a forged check, since the husband had no au-

thority to sign the name of the wife. Similarly in the case at bar, Appellant had no authority to sign the name of "N. and T. Libling." [R. T. 359], James J. Manion [R. T. 384], Manon Manion [R. T. 446], Daniel Bartfield [R. T. 453] Charline Bartfield [R. T. 459], Dolores J. Frankel [R. T. 484], Fay Matorian [R. T. 340], Sam Matorian [R. T. 288-89], Allan S. Frankel [R. T. 466-467].

International Finance Corporation v. Peoples Bank, 27 F. 2d 523 (D. C. N. D. W. Va. 1928), aff'd. 30 F. 2d 46 (4th Cir. 1929), *cert. den.,* 279 U. S. 858, is of dubious authority since *Swift v. Tyson,* 16 Pet. 1, 10 L. Ed. 865, cited therein at page 525, has been overruled by *Erie R. Company v. Tompkins,* 304 U. S. 64 (1938). However, the facts there are distinguishable, since the individual in question in that case, Leps, was in fact the Cashier of the bank and had signed only his name "T. D. Leps, Cashier," on a certificate of deposit. The court there held that it was only in excess of authority and not forgery. On the other hand, in the instant case we have the signing of *another's name and no authority* whatsoever, since Appellant was not trustee of N. & T. Libling [R. T. 359], James J. Manion [R. T. 384], Manon Manion [R. T. 446], Daniel Bartfield [R. T. 453], Charline Bartfield [R. T. 459], Dolores J. Frankel [R. T. 484], Fay Matorian [R. T. 340], Sam Matorian [R. T. 289], and Allan S. Frankel [R. T. 467].

If we were to consider that the Appellant had merely assumed authority, it would nevertheless be deemed forgery under the theory posited by *Security National Bank of Durand v. Fidelity and Co. of N. Y.,* 246 F. 2d

582 (7th Cir. 1957), at pages 585-586, wherein it is stated:

> "To constitute forgery there must be a false making, that this might be accomplished by the fraudulent application of a false signature to a true instrument or a real signature to a false instrument; and that the essence of forgery is an intent to injure or defraud at the time the action complained of is done."

There, the signing of one's own name in excess of authority was held to be forgery.

Furthermore, it has been well-settled that the crime of forgery may be committed by the signing of a fictitious or assumed name.

> *Rowley v. United States,* 191 F. 2d 949 (8th Cir. 1951);
>
> *Milton v. United States,* 110 F. 2d 556 (D. C. Cir. 1940).

Under the circumstances and facts of the present case the defendant signed the payee's name and then signed "by R. Milo Gilbert, trustee." As it can be ascertained from above, the Appellant was not in fact the trustee. Therefore, in reality there is no individual existing entitled "R. Milo Gilbert, trustee." It is thus submitted that it would be a fictitious name and therefore a forgery even in this instance. The Appellee contends that the signing by Appellant of the various payees' names without authority constituted forgery and the trial court was correct in not giving the instruction as requested by Appellant.

D. It Was Not Error to Admit Evidence Concerning the Tax Returns in Connection With the Forgery and False and Fraudulent Statements Re Endorsement of Checks Counts.

In ruling on the admissibility of evidence, a trial judge is accorded large discretion.

Moore v. United States, 150 U. S. 57 (1893).

Appellant urges that "testimony concerning income tax returns, how the address was made out, how much fee was being paid defendant for preparing returns" do not bear on the question of forgery or misrepresentation. (Appellant's Br. p. 49.)

Evidence of similar acts are admissible to show design, purpose, and common scheme.

Nye & Nissen v. United States, 336 U. S. 613, 618 (1949);

United States v. Leviton, 193 F. 2d 848, 852 (9th Cir. 1951);

Enriquez v. United States, 188 F. 2d 313, 316 (9th Cir. 1951);

Todorow v. United States, 173 F. 2d 439, 447 (9th Cir. 1949), *cert. den.,* 337 U. S. 925 (1949);

Tedesco v. United States, 118 F. 2d 737, 740 (9th Cir. 1941).

It is true that the forgery and misrepresentation concern the income tax refund checks, but the *modus operandi* of committing these crimes is found in the evidence which was admitted. The income tax returns were filed with false deductions and expenses [*e.g.* R. T. 374, 376, 377, 342], for which income tax refund checks

would be sent to the payees. However, in this case the checks were sent in care of the Appellant without the knowledge of the payees [*e.g.* R. T. 383, 451, 465], whereupon the appellant would then forge the names of the payees and cash the checks for his own benefit.

Not only is the evidence relevant and material, but manifested the plan and design of appellant in committing the crimes and the trial court certainly did not commit error in admitting this evidence.

E. There Was Sufficient Evidence to Sustain Verdicts as to Counts Twenty-One and Twenty-Two.

Initially, appellant is confronted with the well-settled proposition that the appellate court will not substitute its judgment for that of the trial court in findings of disputed facts. Also, the appellate court will consider evidence and all inferences which can reasonably be drawn from the aspect most favorable to support these findings.

Glasser v. United States, 315 U. S. 60, 80 (1941);

Sandez v. United States, 239 F. 2d 239 (9th Cir. 1956);

Arena v. United States, 226 F. 2d 227, 229 (9th Cir. 1955), *cert. den.,* 350 U. S. 954 (1946).

The trial court instructed the jury as to this particular issue thusly:

"Where a tax accountant represents a taxpayer in the preparation of tax returns, there is no pre-

sumption of authority and the rights of the tax accountant must be governed by the terms of his employment, as applies to any other ordinary agency.

"Also, a power of attorney to prosecute a claim against the Government giving authority to receive a check in payment gives the agent no power to endorse and collect the check. But such authority may be given either orally or in writing." [R. T. 1099.]

The credibility of witnesses and the weight to be given their testimony are to be determined by the trier of facts.

Stopelli v. United States, 183 F. 2d 391, 394 (9th Cir. 1950);

Norfolk v. McKenzie, 116 F. 2d 632, 635 (6th Cir. 1941).

In the case at bar, although the Bartfields admitted that the signature on the alleged power of attorney was their signatures [R. T. 454-459], yet they further stated that they had not given appellant authority to cash their checks [R. T. 453, 459], nor did they remember signing the document purporting to be the power of attorney. [R. T. 454, 462.] Under the circumstances the jury could very well have believed that appellant did not in fact have the power of attorney or the authority to endorse the names of the various payees. It is apparent there was sufficient evidence to support the verdict on these two counts.

VI.
CONCLUSION.

1. Appellee's case is not based on illegally obtained evidence.

2. Exhibits Nineteen and Twenty-two were properly admitted.

3. The crime of forgery was committed.

4. It was not error to admit evidence concerning the tax returns in connection with the forgery and false and fraudulent statements regarding endorsement of checks counts.

5. There was sufficient evidence to sustain the verdict as to Counts twenty-one and twenty-two.

Respectfully submitted,

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